Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

* * *

NO. 75-124

* * *

STATE OF TEXAS,

Petitioner

V.

EARL ELMER WHITE,

Respondent

* * *

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

* * *

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SUBJECT INDEX

Page

OPINIONS BELOW 1

JURISDICTION 2

QUESTION PRESENTED 3

CONSTITUTIONAL PROVISIONS INVOLVED 3

STATEMENT OF THE CASE:

A. GENERAL BACKGROUND 4

B. FACTS MATERIAL TO THE QUESTION PRESENTED 4

C. MANNER IN WHICH THE FEDERAL QUESTION WAS RAISED 6

REASONS FOR GRANTING THE WRIT 8

CONCLUSION. 11

PROOF OF SERVICE 13

APPENDIX A: OPINION OF TEXAS COURT OF CRIMINAL APPEALS. 1a

APPENDIX B: DISSENTING OPINION ON STATE'S MOTION FOR REHEARING, JUDGE MORRISON, TEXAS COURT OF CRIMINAL APPEALS. 1b

APPENDIX C: DISSENTING OPINION ON STATE'S MOTION FOR REHEARING, JUDGE DOUGLAS,

Page

TEXAS COURT OF CRIMINAL APPEALS 1c

APPENDIX D: JUDGMENT OF TEXAS COURT OF CRIMINAL APPEALS 1d

INDEX OF AUTHORITIES

CASES Page

Chambers v. Maroney, 399 U.S. 42 (1970). 3, 6, 7, 8, 9, 10, 11

Hass v. Oregon, ___ U.S. ___ 43 L.Ed.2d 570 (No. 73-1452, March 19, 1975) 9

Stoddard v. State, 475 S.W.2d 744 (Tex. Crim. App. 1972) 7

OTHER AUTHORITIES:

UNITED STATES CONSTITUTION

Amendment IV 3, 10

Amendment XIV, Sec. I 4, 10

28 United States Code Sec. 1257(3) 2

Vernon's Annotated Penal Code, Art. 996 4

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STATE OF TEXAS,
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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

* * *

The Petitioner, State of Texas, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Criminal Appeals of Texas entered in this proceeding on April 25, 1975.

OPINIONS BELOW

The opinion of the Court of Criminal Appeals

of Texas reversing and remanding White's conviction of attempting to pass a forged instrument, Appendix A hereto, will be reported at 521 S. W. 2d 255 (1975). The dissenting opinions of two Judges of the Court of Criminal Appeals of Texas on that Court's over-ruling of the State's first motion for rehearing are Appendices B and C hereto, and will be reported in 521 S. W. 2d 258 (1975).

JURISDICTION

The first opinion of the Court of Criminal Appeals of Texas, the Court of last resort in criminal cases of that State, Appendix A hereto, was delivered on July 2, 1974. That Court over-ruled the State's first motion for rehearing with two Judges dissenting, Appendices B and C, on April 2, 1975, and on April 23, 1975, over-ruled the State's motion for leave to file second motion for rehearing and to stay mandate pending resort to this Court for certiorari. Judgment and mandate of the Court of Criminal Appeals of Texas was entered reversing and remanding the case back to the 108th Judicial District Court of Potter County, Texas, on April 25, 1975; and this petition for writ of certiorari was filed within 90 days of that date, pursuant to Rule 22(1). A copy of the Judgment is attached hereto as Appendix D.

This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1257(3), upon the basis that the opinion by the highest court in the State of Texas concerning criminal matters imposes upon the State greater restrictions in the introduction of evidence under the Fourth Amendment to the United States Constitution as a matter of Federal constitutional law than has

been imposed by the United States Supreme Court in its interpretation of the Fourth Amendment to the United States Constitution. The holding of the Texas Court of Criminal Appeals was that "for Federal constitutional reasons, the prosecution could not utilize otherwise relevant evidence."

QUESTION PRESENTED

Notwithstanding this Court's decision in Chambers v. Maroney, 399 U.S. 42 (1970), does the Fourth Amendment, as applicable to the States through the Fourteenth Amendment, prohibit the use in evidence by the prosecution of items seized in a warrantless search of an automobile where probable cause to search the automobile existed at the place of arrest but the search was not made until after the automobile was removed to the police station and searched 30 to 50 minutes later? Simply stated, the question presented is whether or not exigent circumstances, as interpreted by this Court in Chambers v. Maroney, supra, were not shown to exist merely because the seizure of the automobile took place at two o'clock in the afternoon in a city and there was no showing that a magistrate was not readily available, that there was no prospect of the car being taken from the station by anyone and that the search at the scene of the arrest would not have been dangerous to the officers.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

"The right of the people to be secure

in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . .

United States Constitution, Amendment XIV, Section 1:

. . . Nor shall any State deprive any person of life, liberty or property, without due process of law . . ."

STATEMENT OF THE CASE

A. General Background

White as convicted upon trial by a jury of knowingly attempting to pass as true a forged instrument in writing (Vernon's Ann. P.C. Art. 996). He appealed his conviction to the Texas Court of Criminal Appeals, which in a 3-2 decision reversed the judgment of conviction on the grounds that certain evidence admitted at the trial was unlawfully obtained in violation of the United States Constitution and should not have been admitted. See Appendix A hereto. The State's motion for rehearing was denied.

B. Facts Material to the Question Presented:

White was arrested at approximately 1:30 P.M., June 28, 1972, at Teller Drive-up Window No. 7 of the First National Bank of Amarillo. The arrest was made on the basis of information from the American National Bank of Amarillo received by Officer Jimmy Stevens at about 1:20 P.M. that White had attempted to pass four checks there, and on information received by Officer Crowell from the First National Bank that White was in the act of attempting

to pass certain checks at one of the drive-in windows at that bank. The car which White drove was described to Officer Stevens as a blue 1966 Lincoln Continental (S/F 23, 24). Crowell and Stevens proceeded to the First National Bank, where they found White in his car at the No. 7 drive-up window. He had already handed the teller four checks and a deposit slip with a request for a portion of the amount in cash, and the teller was waiting for the police before acting upon the tender of deposit. The officers obtained from the teller the checks and deposit slip White had attempted to pass and ordered him to drive across the street and park at the curb. While he was doing so, an official of the bank and Officer Crowell observed him making a hand movement toward the glove compartment, and then toward the seat as though attempting to "stuff" something between the seats (S/F 9, 13). White was ordered out of the car and was taken by Officer Stevens in the police car to the police station, about seven blocks distance. Officer Crowell removed White's car from the public street in downtown Amarillo and drove it to the police station and parked it in the driveway. He gave Officer Stevens the car keys (S/F 17). While in the car, Crowell did not see or look for any checks (S/F 18).

At the station, Stevens talked to White for 30 to 40 minutes and attempted to get his consent for a search of the car. White refused to give such consent. Thereupon, Stevens and Crowell, without obtaining a search warrant, made a search of White's car. In addition to the other information, Officer Stevens also had information that White had attempted to pass checks at the American National Bank prior to his arrest at the First National Bank drive-

up window and that he had reason to believe that he had the American National Bank slip and checks in the automobile when he was arrested. The officers found four wrinkled checks of the same nature as those attempted to be passed, between the fold-down console and the front seat of the car (S/F 27). These checks were admitted in evidence over White's objection (S/F 41).

C. Manner in Which Federal Question was Raised

The Federal question presented herein was originally raised by White, in his pre-trial Motion to Suppress the Evidence obtained by the officers in the search of White's car (S/F 1). White's counsel in making his objection asked the trial judge if she was aware of the case of Chambers v. Maroney, 399 U.S. 42 (1970). He then stated that the search in that case was reasonable because the officers had a report that a robbery had been committed and that the car had been stopped at night. He pointed out that in the present case the facts were different because the arrest was made in the daytime and the car was not reported to be occupied by robbers, and that Chambers v. Maroney was not applicable (S/F 39).

When the trial judge ordered the checks admitted into evidence she stated:

> "I will find there was probable cause for the arrest and probable cause for the search as well. And since it was a moving vehicle, there were exigent circumstances that would have permitted a search at the scene. Under Chambers v. Maroney, I will find that the fruits of the search, even though it was made at a later point at the police station, are admissable in evidence." (S/F 41).

On White's appeal to the Texas Court of Criminal Appeals, this ruling was assigned as error in White's brief as follows:

> "The trial court erred in overruling a motion to suppress evidence unlawfully seized as the result of a warrantless search of defendant's automobile." (Appellant's Brief, at 3)

In its decision reversing White's conviction, the Court of Criminal Appeals relied on Chambers v. Maroney, in holding that at the time of the search White was in custody at the police station, therefore the search was not incident to the arrest. See Appendix A hereto. That Court further stated that the officers made no attempt to give any reason for failing to get a warrant, that although a car is movable there was no evidence of any prospect of it being taken from the station, and that the arrest was not made out on a lonely road around midnight, where the search might have been dangerous to the officers. The Court of Criminal Appeals then found that in the absence of any exigent circumstances which are necessary to justify a warrantless search, there was no justification for a search without a warrant, relying on Stoddard v. State, 475 S.W. 2d 744, 799 (Tx. Crim. App. 1972), citing Chambers v. Maroney, 399 U.S. 47. See Appendix A hereto.

REASONS FOR GRANTING THE WRIT

The Texas Court of Criminal Appeals has decided an important question of Federal constitutional law in a manner in conflict with the applicable decisions of this Court.

In Chambers v. Maroney, 399 U.S. 42, this Court stated,

> "It does not constitute a violation of an accused's Fourth Amendment rights for the police officers to make a warrantless search of an automobile taken to the police station after the accused and others have been arrested while riding in the automobile, where (1) there was probable cause to arrest the occupants of the automobile for armed robbery and to search the automobile for guns and stolen money, (2) an immediate search of the automobile at the time and place of the arrest would have been constitutionally permissible, and (3) it was not unreasonable to take the automobile to the police station before making the search, and probable cause for the search still existed after the automobile was taken to the police station."

In Chambers the Court pointed out that, as the basis for the conclusion that exigent circumstances existed,

> "(t)he blue stationwagon could have been searched on the spot when it was stopped since there was probable cause to search and it was a fleeting target to search. The probable cause factor still obtained at the station house and so did the mobility of the car unless the Fourth Amendment permits a warrantless seizure of the car and the denial of its use to anyone until a warrant is secured." 399 U.S. at 52.

It is very clear that the facts in Chambers were very similar to the facts in this cause. The owner of the automobile was in custody both in Chambers and in this case. Probable cause to search the automobile existed in Chambers and in this case at the scene of the arrest. There was no showing and no reliance by the Court upon the fact that it would have been dangerous or inconvenient to the officers to search the automobile at the scene, either in Chambers or in this case. The availability of a magistrate in order to issue a search warrant was not an issue either in Chambers or before the trial court in this case.

This Court stated in Hass v. Oregon, ____ U.S. ____, 43 L.Ed.2d 570, (No. 73-1452, March 19, 1975):

> "A state is free as a matter of its own to impose greater restrictions on police activity than those this court holds to be necessary upon Federal constitutional standards. But of course, a State may not impose greater restrictions as

a matter of Federal constitutional law when this court specifically refrains from imposing them."

It is clear from the opinion in this cause that the Texas Court of Criminal Appeals has unduly restricted the application of "exigent circumstances" as interpreted by this Court in Chambers, supra, and therefore improperly applied this Court's interpretation of Fourth Amendment rights to the facts in this cause. In applying Chambers, the sole question to be answered in this cause is not whether or not probable cause existed for the search, since the opinion of the Texas Court of Criminal Appeals makes it perfectly clear that the decision is not based upon this factor. Instead, the question is whether or not under the circumstances of this case it was reasonable to remove the car to the police station and search it at that location. In applying the holding of this Court in Chambers v. Maroney, supra, it becomes clear that the Texas Court of Criminal Appeals unduly restricted the application of the officers' right to search and the use of resulting evidence in the prosecution of White.

The opinion of the Texas Court of Criminal Appeals also makes it perfectly clear that this decision is based solely upon the application of the Fourth Amendment to the United States Constitution through the Fourteenth Amendment to the United States Constitution to a State prosecution as the application of these two amendments has been interpreted by this Court. The opinion of the Court of Criminal Appeals cites State cases, but each State case that is cited is based upon United States Supreme Court cases as is

the conclusion which the Court reaches in this cause in its application of the lack of exigent circumstances under Chambers v. Maroney, supra.

CONCLUSION

The Texas Court of Criminal Appeals' decision herein unduly restricts this Court's interpretation of Fourth Amendment rights as to what constitutes a reasonable search of an automobile under exigent circumstances as determined by this Court in Chambers v. Maroney, supra. Therefore, the opinion of the Texas Court of Criminal Appeals in this case improperly prevents Texas prosecutors from using evidence which has been seized in a constitutionally permissible manner. Accordingly, and for the reasons given above, a writ of certiorari should issue to review the judgment and opinion of the Texas Court of Criminal Appeals herein.

Respectfully submitted,

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PROOF OF SERVICE

I, ~~Tom Curtis~~ JOE B. DIBRELL, a member of the Bar of the Supreme Court of the United States, do hereby certify that a copy of the foregoing Petition for Writ of Certiorari has been served on Respondent by placing same in the United States Mail, certified, postage prepaid, addressed as follows: Mr. Jim Brown, Attorney at Law, P.O. Box 15, Canyon, Texas 79015, on this the 22 day of July, 1975.

JOE B. DIBRELL
Assistant Attorney General

APPENDIX A

EARL ELMER WHITE,
Appellant

NO. 47,507 v. Appeal from Potter County

THE STATE OF TEXAS,
Appellee

OPINION

Appeal is from a conviction in a trial before a jury of knowingly attempting to pass as true a forged instrument in writing. Punishment was assessed at five years.

Appellant was arrested at approximately 1:30 P.M., June 28, 1972, at Teller Drive-up Window No. 7 of the First National Bank of Amarillo. The arrest was made on the basis of information from the American National Bank of Amarillo received by Officer Jimmy Stevens at about 1:20 P.M. that appellant had attempted to pass four checks there and on information received by Officer Crowell from the First National Bank that appellant was in the act of attempting to pass certain checks at one of the drive-in windows at that bank. The car which appellant drove was described to Officer Stevens as a blue 1966 Lincoln Continental. Crowell and Stevens proceeded to the First National Bank, where they found appellant in his car at the No. 7 drive-up teller's window. He had already handed the teller four checks and a deposit slip with a request for a portion of the amount in cash, and the teller was waiting for the police before acting upon the tender of deposit. The officers obtained from the teller the

checks and deposit slip appellant had attempted to pass and ordered appellant to drive across the street and park at the curb. While he was doing so, an official of the bank and Officer Crowell observed him making a hand movement toward the glove compartment, and then toward the seat as though attempting to "stuff" something between the seats. Appellant was ordered out of the car and was taken by Officer Stevens in the police car to the police station, about seven blocks distance. Crowell drove appellant's car to the station and parked it in the driveway, and gave Stevens the car keys. While in the car, Crowell did not see or look for any checks.

At the station, Stevens talked to appellant for 30 or 45 minutes, and attempted to get his consent for a search of the car. Appellant refused to give such consent. Thereupon, Stevens and Crowell, without obtaining a search warrant, made a search of appellant's car. They found four wrinkled checks of the same nature as those received by them from the First National Bank teller stuffed between the fold-down console and the front seat of the car. These checks were admitted in evidence over appellant's objection.

Appellant initially makes the contention that the officers violated his rights under the Fourth Amendment in searching his car without first obtaining a search warrant.

Since appellant was engaged in the act of committing a felony in the presence of the officers when they apprehended him, their right to arrest him is not being questioned. The right of the officers to

search his car after appellant had, at their instructions, driven it across the street and before it was moved to the police station is not before us, since the officers did not make a search at that time. Officer Crowell testified that he saw no incriminating papers in the car while he was moving it to the police station.

At the time the search was made appellant was in custody at the police station. Therefore, the search was not incident to the arrest. Stoddard v. State, 475 S.W.2d 744, 749, citing Preston v. United States, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777; Chambers v. Maroney, 399 U.S. 47, 90 S.Ct. 1975, 26 L.Ed.2d 419.

> "[T]he reasons that have been thought sufficient to justify warrantless searches carried out in connection with an arrest no longer obtained when the accused is safely in custody at the station house." Chambers v. Maroney, supra.

In Cady v. Dombrowski, _____ U.S. _____, 93 S.Ct. 2523 (1973), the Supreme Court construed Preston v. United States, supra, as holding that "Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest," and limited its holding "for the proposition that the search challenged there could not be justified as one incident to an arrest."

In Harris v. State, 486 S.W.2d 88, we cited Chambers v. Maroney, supra, as holding that "for

constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment."

However, the officers on arresting the appellant did not search the car immediately on arresting appellant. They took him to the police station, and tried for between 30 and 40 minutes to secure his consent to search his car. He refused to give such consent. Evidently, at that time they were in doubt as to their legal right to make a search without a warrant. Having the appellant in custody, and having the keys to his car, which at that time was in the station breezeway, the exigencies required for a warrantless search of the car were not present. The officers made no attempt to give any reason for failing to get a warrant. The time was around two o'clock in the afternoon, in the city of Amarillo, and there is no showing that a magistrate was not readily available. There is no evidence that, although a car is movable, there was any prospect of it being taken from the station by anyone. The arrest was not made out on a lonely country road around midnight, where the search might have been dangerous to the officers, as the Supreme Court noted was in the case in Chambers v. Maroney, supra.

The Supreme Court recognizes that one of the established exceptions to the warrant requirements is the search of an automobile on the highway where there is probable cause to support the search, and where it is not practical to secure a warrant because

the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought. Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed 2d 543; Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564; Chambers v. Maroney, supra. These authorities support the proposition that the burden is on the State to show that the exigencies of the situation make a search without a warrant imperative. But the search of appellant's car cannot be sustained under the automobile exception, for there is no showing in the evidence of any reasonable likelihood that the automobile would be moved.

We quote as follows from Stoddard v. State, 475 S.W.2d 744:

"The general rule is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment--subject only to a few specifically established and well-delineated exceptions.' Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576, accord Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 2032, 29 L.Ed.2d 564 (1971). 'Only in exigent circumstances will the judgment of the police as to probable cause serve as a sufficient authorization for a search.' Chambers v. Maroney, 399 U.S. 42, 51, 90S.Ct. 1975, 1981 (1970). The mere fact that probable cause exists will not obviate the necessity for procur-

ing a warrant, unless the search falls within one of the exceptions to the general rule. 'Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity . . . .' Johnson v. United States, 333 U.S. 10, 14, 68 S.Ct. 367, 369, 92 L.Ed.2d 436 (1948). 'Belief, however well founded, that an article sought is concealed in a dwelling house, furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause.' Agnello v. United States, 269 U.S. 20, 33, 46 S.Ct. 4, 6, 70 L.Ed. 145 (1925); Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 2030, 29 L.Ed.2d 564 (1971).

"Therefore, even if the officers had probable cause to believe that marihuana was concealed in appellant's automobile, that fact, standing alone, would not justify a warrantless search. . . ."

In Stoddard, the Court held that "The test is whether 'exigent circumstances' makes the obtaining of a warrant impracticable. In the instant case no showing is made as to why the obtaining of a warrant was not practicable. ." The judgment was reversed.

In the absence of the "exigent circumstances" which are necessary to justify a warrantless search, we find no justification for a search without a warrant. The four checks seized in the search were unlawfully obtained, and should not have been admitted. Stoddard v. State, supra.

These checks, which were proved to be forged, were before the jury for their consideration at both the guilt and the punishment stage. After finding appellant guilty of attempting to pass a similar forged check, the jury assessed the maximum penalty. Art. 996, V.A.P.C. We do not find beyond a reasonable doubt that the error is harmless.

The judgment is reversed, and the cause is remanded.

Green, Commissioner

(Delivered July 2, 1974)

Opinion approved by the Court

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APPENDIX B

EARL ELMER WHITE,
Appellant

No. 47,507 v. Appeal from Potter County

THE STATE OF TEXAS,
Appellee

DISSENTING OPINION ON
STATE'S MOTION FOR REHEARING

At the time this case was first submitted on rehearing, Judge Jackson, then a Commissioner with this Court, prepared an opinion which I now adopt as my dissent.

"We have concluded that the search of appellant's automobile at the police station was legal, and the evidence thus obtained was admissible.

It is conceded that appellant's arrest was legal and that probable cause existed for the search incident to that arrest at that time, but it is contended that the removal of the automobile to the police station and the warrantless search some 30 to 50 minutes later was not proper.

The record shows that the felony committed in the officer's presence was at a drive-in window of a bank on a busy street, and that it was not practical to search there. It was more consistent with the safety and convenience of the appellant, his automobile, and the officers to remove the car to the police station to complete the search incident to the arrest.

The fact that in the meantime the officers sought to obtain consent from appellant for the search, which was refused, in no way militated against the right to search, and was reasonable under the circumstances.

The entire series of events culminating in the recovery of additional forged checks from appellant's automobile was one continuous transaction. As was said in Taylor v. State, 421 S. W. 2d 403, cert. denied, 393 U.S. 916, 89 S. Ct. 241, 21 L. Ed., 2d 201, opinion on appellant's motion for rehearing 'the removal of this automobile to Marshall, and the subsequent search were a series of events constituting one continuous happening.'

We have also approved later warrantless searches under similar facts in Lara v. State, 469 S. W. 2d 177, on appellant's motion for,rehearing; and in Gomez v. State, 470 S. W. 2d 871. These holdings are in accord with Chambers v. Maroney, 399 U.S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d 419, . . .

We have considered the additional grounds of error presented by appellant and find them to be without merit.

The State's Motion for Rehearing is granted and the judgment is affirmed.

JACKSON,Commissioner"

I dissent.

MORRISON, Judge

(Delivered April 2, 1975)

APPENDIX C

EARL ELMER WHITE,
Appellant

NO. 47,507, v. Appeal from Potter-County

THE STATE OF TEXAS,
Appellee

DISSENTING OPINION ON
STATE'S MOTION FOR REHEARING

The majority overrules the State's motion for rehearing without written opinion.[1]

The majority still does not apply Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419, which is the constitutional law of the United States. The State is being denied due process of law. A state has constitutional rights. See State of California v. Green, 399 U.S. 149, 90 S.Ct.1930, 26 L.Ed.2d 489 (1970).

The majority is not following previously decided cases by this Court. Gomez v. State, 470 S.W.2d 871, written by one of the majority in this case, upheld a search of a car at the police station after a search was made at the time of arrest. The arrest was made upon information given by an informant who stated that Gomez and Torres were preparing heroin for distribution and that the two would be leaving in a "'60 Pontiac, blue and white."

---

[1]The dissenting opinion on the original submission is withdrawn.

In the Gomez case, it is written:

"The appellant also complains that the search of the automobile was illegal because the search was conducted without a warrant at the police station later, and not immediately at the site of the arrest. Gann's testimony relevant to this matter was as follows:

> "'Q. Now, Officer, when you got to the police station, what did you do?
>
> "'A. Sgt. Hersom took Gloria Olivio upstairs, and Sgt. Taylor and myself remained and conducted the search of the vehicle, of the '60 Pontiac.
>
> "'Q. Now, Officer, why was it necessary to continue the search down at the police station?
>
> " * * *
>
> "'A. It was impossible to conduct a search there at that location due to the crowd and the circumstances. We felt we were blocking traffic, and the crowd that had gathered there, it seemed imperative that we continue the search at some place where we

> might be sure we had not missed anyone or anything.'
>
> "'The relevant test, in cases like that at bar, is whether the search was reasonable under all of the circumstances, for it is only unreasonable searches that are prohibited by the Fourth Amendment.' Taylor v. State, Tex.Cr.App., 421 S.W.2d 403. A search is not unreasonable if the automobile is searched at another place if the subsequent search is a part of a series of events constituting one continuous happening. Taylor v. State, supra." (Emphasis supplied)

In the Taylor case, supra, this Court upheld the search of an automobile after a traffic arrest. The arrest was for a traffic violation at Waskom, some eight miles from the courthouse at Marshall. Probable cause was shown to search the car. An officer took the keys from Taylor. The officer searched the trunk of the car without a warrant after they reached the magistrate's office at the courthouse. He found marihuana in a coffee can. This Court held that search was legal and the marihuana was admissible and wrote:

> "/T/he removal of this automobile to Marshall, and the subsequent search were a series of events constituting one continuous happening."

and,

> "As pointed out by the Supreme Court in Cooper v. State of California /386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730/, and in Preston v. United States, /376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777/, the question there decided was not whether the search was authorized by state law, but whether the search was reasonable under the Fourth Amendment. Both opinions make it clear that whether a search is reasonable depends upon the facts and circumstances of each case."

In Cooper v. California, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730, it is written:

> "It is no answer to say that the police could have obtained a search warrant, for '/t/he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable.' United States v. Rabinowitz, 339 U.S. 56, 66 94 L.Ed. 683, 660, 70 S.Ct. 430."

In Brown v. State, 475 S.W.2d 938, this Court upheld the search of the trunk of an automobile that Brown had been driving which was made in his absence without a warrant some twelve hours after officers received information of the crime of murder.

We will look at the facts to see if the officers had probable cause to search the automobile. The majority does not question the right to arrest.

Appellant was arrested in his car at the First National Bank in Amarillo where he had attempted to pass as true four forged checks with a deposit slip listing the checks. Had he been successful in passing these checks he would have collected $279 cash. He did not have an account at the bank.

Arlain Miller testified that she worked at the American National Bank in Amarillo. Appellant had four out-of-town checks listed on a deposit slip. He had no account at that bank under his name and there was no account number as he had listed on the deposit slip. She kept a copy of the deposit slip and returned two copies and the checks to appellant.

Maxine Bayless testified that she was a teller at the American National Bank and that appellant had on the deposit slip the four checks and the total amount less cash but he had no account in the bank.

Joyce Cross, a teller at the American National Bank, testified that appellant tried to make a deposit of checks but there was no account in that name or number. There were four out-of-town checks to be deposited and he wanted back $279 in cash. She called Marvin Keith Herring, a security officer at the First National Bank, and the Amarillo Police Department, and "I told them that we had a man there attempting to deposit some checks; that we had made a routine check and we did not have an account in the name that he was trying to deposit the checks in or the number."

Detective Jimmy Stephens of the Amarillo Police Department testified that he received a call

from Herring who related that he had received a call from a Mrs. Cross from another bank, that a fellow tried to pass some checks and that he was now at the drive-up window.

After arriving at the bank, officers had appellant move his car from the drive-up window. Herring, the assistant cashier of the First National Bank, saw appellant make a motion from the glove compartment to the area of the front seat divider. He saw wrinkled or crumpled papers in the fold of the seat.

Detective Crowell who was at the bank at the time of the arrest testified that Herring told him about seeing movements of appellant's hand from the glove compartment to the seat. Crowell advised Herring that he saw it also and later told Detective Stephens about it. Crowell drove appellant's car some six or seven blocks to the police station.

The car was searched at the police station approximately forty to fifty minutes after the arrest and the other checks complained to be the result of an illegal search were found.

Officer Crowell testified that he did not know how many checks were supposedly passed. He testified that appellant was taken out of his car when it was verified there was "no such account and no such number."

The following occurred:

"Q. (Prosecutor) Did you have author-

ity to impound the car?

"A. Yes, sir, we did.

"Q. And the normal procedure is for you to search the car before you impound it?

"A. Yes, sir; we are required to take the person out of the car; that we are responsible for the car and its contents; therefore, we search the vehicle for any valuables. (Emphasis supplied)

"Q. What do you do with the valuables?

"A. We book them in.

" * * *

"Q. Who gave you authority to impound the car?

"A. No, sir, we impounded it due to the fact that we took him out of the car during the arrest."

Detective Jimmy Stephens testified that when the officers arrived at the First National Bank they saw the appellant in a '66 Continental four-door blue hard top. This matched the description he got from the American National Bank. While at that bank, Stephens obtained from the teller the deposit slips and the checks that appellant attempted to pass.

Stephens testified that he advised appellant of his rights. Then the following occurred:

> "Q. (Prosecutor) Was it also normal detective procedure to ask a suspect like that when you think a search might be in order, to ask the suspect if he wants to consent to the search?
>
> "A. Yes, I sure did.
>
> " * * *
>
> "Q. And did he consent or not?
>
> "A. No, sir, he refused."

After this, Stephens and Crowell searched the car. Stephens found four checks folded and stuffed "between the fold down console and the seat itself."

On cross-examination Stephens was asked what he was looking for when he conducted the search. He stated:

> "Well, we had known that he had attempted to pass checks at the American National, and we had recovered the checks from the First National, the First National Drive-up Window.
>
> "And I felt as though there would be possibly other checks from the American National. . . .

> " * * *
>
> "And he had presented the American National deposit slip at the American National. This is what I was looking for.
>
> " * * *
>
> "Yes, sir, I had reason to believe that there were American National deposit slips in there."

Stephens, when asked if he had to look around to find the checks, stated: "I had to look inside the car. I saw them. * * * When I stuck my head in the car I saw them." And, "Well, I saw what appeared to be checks to me and then I reached down and got them."

On cross-examination he was asked, "So you were just looking for anything that you might run across in the car?" He answered, "I guess just a general search." On redirect he testified, "I felt as though he probably would have had to have an American deposit slip to make the deposit. I think that is standard procedure at banks. They said he already had the deposit made up. It was already made up." Stephens also testified that he found the checks where Detective Crowell indicated he had seen appellant appear to be placing something in the area to the right of where he was sitting.

Appellant's counsel in making his objection asked the trial judge if she was aware of the case of Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975,

26 L.Ed.2d 419. He then stated that the search in that case was reasonable because officers had a report that a robbery had been committed and that the car was stopped at night. He pointed out that in the present case the facts were different because the arrest was made in the daytime and the car was not purported to be occupied by robbers, and that Chambers v. Maroney was not applicable.

When the trial judge ordered the checks admitted into evidence, she stated:

> "I will find there was probable cause for the arrest and probable cause for the search as well.[2]

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[2]Even the employees at either bank had the right to arrest appellant under the facts of this case. Article 14.01, V.A.C.C.P., provides:

> "(a) A peace officer or any other person, may, without a warrant, arrest an offender when the offense is committed in his presence or within his view, if the offense is one classed as a felony or as an offense against the public peace.
> "(b) A peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view."

> " * * * *
>
> "Under the doctrine of Chambers v. Maroney, I will find that the fruits of the search, even though it was made at a later point at the police station, are admissible in evidence."

The trial judge has sufficient evidence and authority upon which to base her ruling.

This is like the Taylor case, supra. The officers took the forged checks from the bank. The possession of forged checks with intent to pass them is a felony. The officers had probable cause and the officers had appellant move his car from the teller's window "to clear the driveway."

This cause is being reversed upon the grounds that Chambers, supra, is not applicable.

Recently, Justice Powell, Speaking for the Supreme Court of the United States, in Gerstein v. Pugh, ___ U.S. ___, 95 S.Ct. 854, ___ L.Ed.2d ___, 16 Crim.L.Rep. 3052 (February 18, 1975), wrote:

> "Maximum protection of individual rights could be assured by requiring a magistrate's review of the factual justification prior to any arrest, but such a requirement would constitute an intolerable handicap for legitimate law enforcement. Thus, while the Court has expressed a preference for the use of arrest warrants when feasible, Beck v. Ohio, supra,

> at 96 /379 U.S. 89, 91/; Wong Sun v. United States, 371 U.S. 471, 479-482 (1963), it has never invalidated an arrest supported by probable cause solely because the officers failed to secure a warrant. See Ker v. California, 374 U.S. 23 (1963); Draper v. United States, 358 U.S. 307 (1959); Trupiano v United States, 334 U.S. 699, 705 (1948)."

There was probable cause in the present case but no search warrant for the car was obtained. The present case is stronger in favor of the search than Taylor v. State, supra, but the majority does not even distinguish the two.

The passing of Taylor and Gomez should be noted by the majority and their interment should be conducted with more dignity.

There is no legal or logical reason to hold that a search could not be made at the police station a short time after the arrest when a search could have been made at the bank.

The exclusionary rule which, in part, prohibits the introduction of evidence obtained in a search because an officer makes a mistake has nothing to do with an accused's guilt or innocence. The rule does not punish the officer, it only hurts the law-abiding public when a guilty person goes free because an officer makes an honest mistake. We should not extend the exclusionary rule where it is not required by the Supreme Court of the United States or other constituted authority. Some acceptable substitute for such a rule should be considered by the Supreme Court of the United States and the Legislature of Texas. See Wright, Must The Criminal Go Free If The Constable Blunders, Tex. L.Rev., Volume 50, Page 736 (1971); American Criminal Law Review, The Fourth Amendment Exclusionary Rule: Past, Present, No Future, Volume 13, Page 507 (1975). Even though the Supreme Court, in my opinion, does not require the exclusion of the checks in question from evidence, this Court holds the exclusionary rule applies and reverses the conviction.

Decisions such as the one in this cause should cause a reappraisal of the rule.

Chambers v. Maroney is still alive, except in Texas. It should be followed and the judgment affirmed.

Douglas, Judge

(Delivered April 2, 1975)

APPENDIX D

THE STATE OF TEXAS

To the 108th. Judicial District Court of Potter County, Greeting:

Before our Court of Criminal Appeals, on the 23rd day of April A. D. 1975, the cause upon Appeal to revise or reverse your judgment between

Earl Elmer White, Appellant,

No. 47,507

vs.

THE STATE OF TEXAS, Appellee,

was determined; and therein our said Court of Criminal Appeals made its order in these words:

"This cause came on to be heard on the Transcript of the record of the Court below, and the same being inspected, because it is the opinion of this Court that there was error in the judgment, it is ordered, adjudged and decreed by the Court that the judgment be reversed and the cause remanded for further proceedings in accordance with the opinion of this Court, and that this decision be certified below for observance." written State's first & second motions for rehearing overruled without opinion.

WHEREFORE, we command you to observe the order of our said Court of Criminal Appeals, in this behalf and in all things to have it duly recognized,

obeyed and executed.

WITNESS, the HON. JOHN F. ONION, JR., Presiding Judge of our said Court of Criminal Appeals, with the seal thereof annexed, at City of Austin, Texas, this 25th day of April A.D. 1975

GLENN HAYNES, Clerk

Tommy Lowe, Deputy Clerk